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Supreme Court, U.S.
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No. 10-85

In The
Supreme Court of the United States

BARRY SCHEUR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For the Fifth Circuit**

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BY ROBERT McMILLAN

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QUESTION PRESENTED

None of the defendants testified at trial. In rebuttal closing, the prosecutor gestured toward the defendants, raised his voice and said, "[n]ot one of these defendants has stepped up and admitted they did anything wrong." The jury deliberated for over two days, stated that they were having difficulty reaching consensus, and rendered a split verdict along with a note that said, "we do hope (and some of us pray) that we have not done wrong by the defendants, the people of the United States, or this court."

Accordingly, the question presented is whether a prosecutor's comment on defendants' decisions not to testify may be deemed harmless by the appellate court when the trial court found that this was a close jury case in which the prosecutor's comment may have been prejudicial.

PARTIES TO THE PROCEEDING

Petitioner, Barry S. Scheur, and respondent, Robert McMillan, were co-defendants at trial and appellants in the Fifth Circuit. Robert McMillan separately filed a Petition for a Writ of Certiorari that has been docketed as No. 10-5263.

TABLE OF CONTENTS

QUESTION PRESENTED ii

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATEMENT 1

I. THE DISTRICT COURT PROCEEDINGS. 1

II. THE FIFTH CIRCUIT'S OPINION. 4

REASONS FOR GRANTING THE PETITION 4

I. THE FIFTH CIRCUIT'S OPINION ILLUSTRATES THE INCONSISTENT APPLICATION OF *GRIFFIN V. CALIFORNIA* AND THE HARMLESS ERROR RULE. 4

A. Prosecutorial Comment On A Defendant's Decision Not To Testify. 4

B. The Harmless Error Rule: Contradictory Interpretations Of The Meaning Of A Split Verdict. 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Ben-Yisrael v. Davis,
431 F.3d 1043 (7th Cir. 2005) 5

Chapman v. California,
386 U.S. 18 (1967) 7

Cleveland v. United States,
531 U.S. 12 (2000) 2

Dugas v. Coplan,
428 F.3d 317 (1st Cir. 2005) 8

Griffin v. California,
380 U.S. 609 (1965) 5

United States v. Bates,
512 F.2d 56 (5th Cir. 1975) 6

United States v. Burse,
531 F.2d 1151 (2d Cir. 1976) 8, 10

United States v. Caro-Quintero,
769 F. Supp. 1564 (C.D. Cal. 1991) 8

United States v. Garza,
608 F.2d 659 (5th Cir. 1979) 8, 10

United States v. Griffith,
118 F.3d 318 (5th Cir. 1997) 9, 10

United States v. Hammond,
598 F.2d 1008 (5th Cir. 1979) 6

United States v. Harding,
525 F.2d 84 (7th Cir. 1975) 8

United States v. Johnston,
127 F.3d 380 (5th Cir. 1997) 5, 6, 11

United States v. Kallin,
50 F.3d 689 (9th Cir. 1995) 5, 7, 10

United States v. Kojayan,
8 F.3d 1315 (9th Cir. 1993) 5, 8

United States v. Lampton,
158 F.3d 251 (5th Cir. 1998) 8

United States v. Roberts,
119 F.3d 1006 (1st Cir. 1997) 5

United States v. Rutkowski,
814 F.2d 594 (11th Cir. 1987) 5

United States v. Scheur,
626 F.Supp.2d 611 (E.D. La. Jan. 7, 2009) 3

United States v. Simtob,
901 F.2d 799 (9th Cir. 1990) 8

United States v. Tenorio,
69 F.3d 1103 (11th Cir. 1995) 5

United States v. Van Eyl,
468 F.3d 428 (7th Cir. 2006) 8

United States v. Watkins,
811 F.2d 1048 (11th Cir. 1987) 6

Statutes

28 U.S.C. § 1254(1) 1

Other Authorities

Supreme Court Rule 12(6) 1

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Robert McMillan respectfully supports Barry Scheur's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 600 F.3d 434.

JURISDICTION

The judgment of the court of appeals was entered March 11, 2010. The petitions for rehearing *en banc* were denied April 12, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Barry Scheur's Petition for a Writ of Certiorari was docketed on July 15, 2010. This response in support of the petition for a writ of certiorari is timely under Supreme Court Rule 12(6).

STATEMENT

I. THE DISTRICT COURT PROCEEDINGS.

In November 2005, Scheur and others were indicted for mail fraud and conspiracy. In February and August 2006, superseding and second superseding indictments were filed. The indictments alleged that defendants fraudulently misstated the financial position of The Oath, a Louisiana health-maintenance

organization, on statements filed with Louisiana Department of Insurance (LDOI) in 2000 and 2001. In April 2007, the district court dismissed the indictments under *Cleveland v. United States*, 531 U.S. 12 (2000), because they failed to allege that anyone other than the LDOI was defrauded. On April 27, 2007, a third superseding indictment was issued. The district court denied defense motions to dismiss.

A jury trial was held in April and May 2008. There was conflicting testimony regarding the propriety of the transactions at issue. Witnesses testified in defendants' favor on the legitimacy of assets claimed in The Oath's financial statements, Louisiana's statutory accounting rules, and the discretion of the LDOI to permit reporting of assets at variance with National Association of Insurance Commissioners' guidelines.

In rebuttal closing, the prosecutor stated that "*this case was about lying on the financial reports to stay in business and that's where we're going to start.*" He then turned toward the three defendants, raised his voice, gestured at them, and stated, "*not one of these defendants is stepping up and saying that they did anything wrong.*"

Defendants moved for a mistrial. The court denied the motions. The court attempted a curative instruction. After the instruction, the prosecutor stated: "*what I meant to say was here is that there is blame being pla[c]ed at the face of*

everybody in this courtroom but there's no responsibility at all being taken on behalf of the defendants."

The jury deliberated for well over two days and wrote multiple notes to the district judge indicating that they were having difficulty reaching consensus. The jury ultimately found Scheur guilty on eight of fourteen counts. The verdict was accompanied by a typewritten note stating that "we do hope (and some of us pray) that we have not done wrong by the defendants, the people of the United States, or this court." The court questioned each juror *in camera* regarding the note's creation. Jurors' *in camera* comments further indicated that they had difficulty reaching a verdict.

In a published opinion granting the defendants bail pending appeal, the district court recognized that this was a close case in which the prosecutor's comment on defendants' silence may have been prejudicial. *United States v. Scheur,* 626 F.Supp.2d 611 (E.D. La. Jan. 7, 2009). In a case such as this, where the jurors deliberated for several days, sent a number of written notes to the court seeking clarification and expressing difficulty in reaching agreement, and then ultimately rendered a split verdict, the prosecutor's remarks present an additional substantial issue on appeal.

II. THE FIFTH CIRCUIT'S OPINION.

The Fifth Circuit affirmed the district court in all respects. Concerning the prosecutor's comments, even assuming they were improper, the Fifth Circuit found the error to be harmless. It supported this conclusion by noting that the jury rendered a split verdict, and thus could not have been "inflamed" by the prosecutor's remarks. This conclusion was the opposite of that reached by the district court in its order granting bail pending appeal because the split verdict reflected the closeness of the case, and presented a substantial issue on appeal. Scheur, however, never argued that the comment "inflamed" the jury; rather, he argued that the comment may have caused an impermissible inference to influence conviction on some counts.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S OPINION ILLUSTRATES THE INCONSISTENT APPLICATION OF *GRIFFIN V. CALIFORNIA* AND THE HARMLESS ERROR RULE.

A. Prosecutorial Comment On A Defendant's Decision Not To Testify.

In rebuttal closing, the prosecutor gestured emphatically toward defendants, raised his voice and stated: "*Not one of these defendants is stepping up and saying that they did anything wrong.*" The district court denied defendants' mistrial motions and immediately gave burden of proof and presumption of innocence instructions. The court did *not* immediately give a curative Fifth Amendment

instruction that no adverse inference may be drawn from a defendant's decision not to testify. After the instruction, the prosecutor continued: "What I meant to say was here is that there is blame being pla[c]ed at the face of everybody in this courtroom but *there's no responsibility at all being taken on behalf of the defendants*."

This Court long ago held that a prosecutor's "comment on the refusal to testify is a remnant of 'the inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965) (internal citation omitted). "Prosecutors are prohibited from commenting directly or indirectly on a defendant's failure to testify in a criminal case." *United States v. Johnston*, 127 F.3d 380, 396 (5th Cir. 1997). However, the implementation of *Griffin* by the lower courts has led to a body of case law in which the line between what constitutes an impermissible comment and what does not is unintelligible. *Compare United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997) (reversal under plain error standard due to prosecutorial comment on defendant's silence at trial); *United States v. Tenorio*, 69 F.3d 1103 (11th Cir. 1995) (reversal due to prosecutor's comment on post-arrest silence); *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (same); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *Ben-Yisrael v. Davis*, 431 F.3d 1043, 1050 (7th Cir. 2005); *with United States v. Rutkowski*, 814 F.2d 594, 597 (11th Cir. 1987) ("there is no explanation for

anybody being on that plane" held not improper); *United States v. Watkins*, 811 F.2d 1048, 1412 (11th Cir. 1987) ("why then could not the defendant say 'well, that's not me on the tape'" held not improper).

Here, the prosecutor chastised "these defendants" for failing to "step up" and "take responsibility" for the alleged crime, yet the Fifth Circuit did not find it reversible error. Conversely, in *United States v. Bates*, 512 F.2d 56 (5th Cir. 1975), the Fifth Circuit reversed on plain error review based on a prosecutor's statement that "[y]ou didn't hear from the culprit." *Id.* at 58. The prosecutor's comments in this case were equally clear, and calling for reversal. As in *Johnston*, the prosecutor made the error worse with his raised voice and gestures toward the defendants. *See Johnston*, 127 F.3d at 397 (prosecutor made "sweeping arm gesture indicating the individuals seated at counsel tables").

B. The Harmless Error Rule: Contradictory Interpretations Of The Meaning Of A Split Verdict.

The "harmless error" rule has become a method for troublesome cases to be disposed of without addressing the merits of a defendant's argument. As stated long ago by Judge Goldberg: "The *Chapman* harmless error rule was not intended to be a cover-up for every prosecutorial error . . . We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights." *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (citing *Chapman v.*

California, 386 U.S. 18 (1967)). The rationales that courts can use to declare an error harmless are virtually limitless.

Here, the Fifth Circuit took the very facts that the district court held illustrated the case was *close*—lengthy deliberations, jury notes expressing difficulty reaching consensus, and a split verdict—and held that they illustrated *the opposite—i.e.*, that the split verdict illustrates the prosecutor's comment was harmless. This was easy enough to do, since there is virtually no limit to the rationales on which an error can be declared harmless, even where case law is directly contrary. *United States v. Kallin,* 50 F.3d 689, 695 (9th Cir. 1995) ("[t]he partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts.").

An error is harmless only because the court of appeals says it is. The district court found that the split verdict indicated the closeness of the case, thus heightening the chance that the prosecutor's comments prejudiced defendants. Under Fifth Circuit precedent, it is well settled that "a prosecutor may not comment directly or indirectly on a defendant's failure to testify." In a case such as this, where the jurors deliberated for several days, sent a number of written notes to the court seeking clarification and expressing difficulty in reaching

agreement, and then ultimately rendered a split verdict, the prosecutor's remarks present an additional substantial issue [on appeal].

The trial court heard the evidence and interpreted the split verdict as an indication of a close case in which the risk of prejudice from the prosecutor's remarks was heightened. The Fifth Circuit used it as a way to find harmless error. This contradicts jurisprudence in that and other courts. *See United States v. Garza,* 608 F.2d 659, 665-66 n.6 (5th Cir. 1979); *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *United States v. Simtob,* 901 F.2d 799, 806 (9th Cir. 1990); *United States v. Harding,* 525 F.2d 84, 87 n.7 (7th Cir. 1975); *United States v. Caro-Quintero*, 769 F. Supp. 1564 (C.D. Cal. 1991); *United States v. Burse,* 531 F.2d 1151, 1155 (2d Cir. 1976) ("in an admittedly close case such as this, prosecutorial misstatements take on greater importance"); *United States v. Van Eyl,* 468 F.3d 428, 438 (7th Cir. 2006).

The Fifth Circuit further buttressed its "harmless error" finding by stating that "the district court gave an immediate curative instruction that the Government bore the burden of proof and that the defendants need not testify or prove anything." The Court cited *United States v. Lampton*, 158 F.3d 251, 260 (5th Cir. 1998) for the assertion that "such an instruction cures any alleged harm from the prosecutor's improper remarks." However, *Lampton* does not include the text of the instruction given there, nor does it state whether the defendant objected in the

trial court or on appeal to the court's failure to instruct that *no adverse inference may be drawn from defendant's decision not to testify. Id.*

Here, defendants expressly objected that the curative instruction was insufficient for that reason, citing *United States v. Griffith*, 118 F.3d 318 (5th Cir. 1997). In *Griffith*, as here, the "curative" instruction addressed the burden of proof and the presumption of innocence, but it *did not say that no adverse inference could be drawn from the defendant's silence.* The "curative" instructions here and in *Griffith* are substantively identical. *See Griffith*, 118 F.3d at 324. Yet in *Griffith*, the Fifth Circuit conducted plain error review, and stated that "we conclude without difficulty that the district court erred by failing to instruct on the Fifth Amendment privilege." *Id.*

The Fifth Circuit noted:

> [T]he district court failed in its obligation to correct the error . . . the district court reminded the jury that Griffith was presumed innocent and that the government had the burden of proving him guilty beyond a reasonable doubt.
>
> *The court neglected to tell the jury that Griffith had a constitutional right not to testify, and that his exercise of that right could not be held against him.*

118 F.3d at 325 (emphasis added). The Fifth Circuit held that "the error was plain" and stated:

> The proper remedy should have been as obvious as the initial constitutional error; *a Fifth Amendment violation calls for a Fifth Amendment instruction. Instructions on the burden of*

> *proof and presumption of innocence are no substitute for [an] explicit instruction on the Fifth amendment privilege.*

118 F.3d at 325 (emphasis added) (internal quotation marks omitted).

Here, the Fifth Circuit ignored precedent and found the error harmless on the basis of a curative instruction that constitutes plain error under that court's own jurisprudence. The trial court heard the evidence and expressly found that the split verdict illustrated *the closeness of the case*, thus *heightening* the chance that the prosecutor's comments prejudiced defendants. The trial court's conclusion is consistent with precedents in the Fifth Circuit and other courts. *See United States v. Garza*, 608 F.2d 659, 665-66 n.6 (5th Cir. 1979) ("The jury apparently found the case quite close despite the prosecutor's improper attempts to influence it. It took eleven hours for the jury to reach a verdict."); *Kallin*, 50 F.3d at 695 ("The partial acquittal indicates that the government's case was not definitive and that the jury's consideration of the impermissible inference may have been a factor resulting in conviction on some counts."); *United States v. Burse*, 531 F.2d 1151, 1155 (2d Cir. 1976) ("in an admittedly close case such as this, prosecutorial misstatements take on greater importance").

The lack of standards for declaring an error harmless allowed the Fifth Circuit to turn the trial court's finding on its head. The circuit court held that the split verdict showed not *the closeness of the case*, but rather that the jury "was not inflamed by the prosecutor's comments" and thus "the prosecutor's comments

failed to rise above the level of harmless error." By this logic, the defense would have been better off if Scheur had been convicted on all counts. Of course, if that had occurred, the court simply could have said that the unanimous verdict illustrated the overwhelming evidence of guilt, thus rendering the error harmless. *Johnston*, 127 F.3d at 380 (5th Cir. 1997) (error is harmless as to defendants against whom evidence was overwhelming). Heads, the government wins. Tails, the defendant loses. This will always be the case absent a clear limitation of the harmless error rule.

CONCLUSION

Barry Scheur's petition for a writ of certiorari should be granted.

Respectfully submitted,

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